

1 UNITED STATES DISTRICT COURT

2 DISTRICT OF MASSACHUSETTS

3 No. 1:09-cr-10243-MLW

4  
5 UNITED STATES OF AMERICA

6  
7 vs.

8  
9 RYAN HARRIS

10  
11 \*\*\*\*\*

12  
13 For Hearing Before:  
14 Chief Judge Mark L. Wolf

15 Contempt Hearing

16  
17 United States District Court  
18 District of Massachusetts (Boston.)  
19 One Courthouse Way  
20 Boston, Massachusetts 02210  
21 Tuesday, February 1, 2012

22 \*\*\*\*\*

23 REPORTER: RICHARD H. ROMANOW, RPR  
24 Official Court Reporter  
25 United States District Court  
One Courthouse Way, Room 5200, Boston, MA 02210  
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1 P R O C E E D I N G S

2 (Begins, 4:00 p.m.)

3 THE CLERK: Criminal Matter 09-10243, the  
4 United States of America versus Ryan Harris. The Court  
5 is in session. You may now be seated.

6 THE COURT: Good afternoon. Would counsel  
7 please identify themselves for the Court and for the  
8 record.

9 MR. BOOKBINDER: Good afternoon, your Honor.  
10 Adam Bookbinder and Mona Sedky for the United States.

11 MR. MCGINTY: Your Honor, for Mr. Harris,  
12 Charles McGinty, from the Federal Defender's Office, and  
13 with me is Miriam Conrad.

14 THE COURT: Mr. Harris, as I understand, is on  
15 the telephone, correct?

16 THE DEFENDANT: Yes, sir, your Honor.

17 (Pause.)

18 THE COURT: I'd like to try to assure that we  
19 share an accurate and complete understanding of the  
20 history of events that brings us here today.

21 On December 13, 2011, I conducted a lengthy  
22 hearing. I denied the defendant's motion to dismiss. I  
23 scheduled the trial of this case for February 21, 2012,  
24 which was actually two weeks later than it had been  
25 previously scheduled. In addition, I discussed with the

1 parties a number of novel and challenging issues  
2 regarding the law concerning conspiracy, wire fraud, and  
3 aiding and abetting, as those concepts apply to this  
4 case, which raises a number of novel and challenging  
5 issues. I discussed the issues the parties had  
6 recognized and I identified and discussed issues that I  
7 had discerned. I cited cases for the parties that I  
8 thought were relevant and said I would, eventually, the  
9 next day, I did provide them with lengthy jury  
10 instructions that I had given last year in **United States**  
11 **vs. DiMasi**. I set a schedule for pretrial submissions  
12 and put aside at least two mornings to conduct hearings  
13 on the issues that I expect will come into sharper focus  
14 in the briefing that I ordered.

15 On December 14, 2011, I issued a written order  
16 memorializing what was stated on December 13, orally.  
17 Among other things I ordered the parties to file, by  
18 January 13, 2012, motions in limine with supporting  
19 memos, proposed jury instructions, trial briefs that  
20 address the major issues I had identified and other  
21 disputes relating to the jury instructions, disputes  
22 that should have been identified because I had ordered  
23 the parties to confer before making their submissions.

24 I established January 25 as the date for responses  
25 to their motions in limine. I scheduled hearings on

1 February 7th and 8th, 2012 to address the foreseeable --  
2 or at least foreseen, anticipated motions in limine and  
3 the legal issues that would be necessary to make  
4 evidentiary rulings at trial -- that would have to be  
5 resolved for me to make rulings at trial and instruct  
6 the jury.

7 Yesterday, January 31, 2012, as I intended to  
8 begin working in anticipation of the hearing scheduled  
9 for next week, I found that the government had made  
10 submissions on January 13th, although it raises issues  
11 in its trial brief that should have been raised in  
12 motions in limine with more meaningful briefing. There  
13 are no memos in support of the evidentiary issues. I  
14 also found that defendant's counsel, Charles McGinty,  
15 had made no submissions in response to the December 14  
16 order nor had he requested any extension of time to do  
17 so.

18 I therefore issued an order on January 31  
19 directing Assistant Federal Public Defender McGinty and  
20 Federal Public Defender Miriam Conrad to appear today to  
21 seek to show cause why I should not institute civil  
22 and/or criminal contempt proceedings against Mr. McGinty  
23 for his failure to obey the December 14, 2011 order.

24 Mr. McGinty yesterday moved for an extension of  
25 time to make the previously-ordered filings. I did not

1 allow that motion. I did endorse it noting that any  
2 issue of civil contempt would be moot if all the  
3 submissions that I previously ordered were made by the  
4 time of this hearing, 4:00 on February 1, and stating  
5 that the issue of possible criminal intent would, in any  
6 event, remain.

7 On the evening of January 31, Mr. McGinty filed a  
8 trial brief and voir dire questions. The trial brief  
9 includes many matters toward the end which are  
10 essentially motions in limine, they are not -- while  
11 occasional cases are cited for some of the points, there  
12 are no supporting memos as required by Local Rule 7.1  
13 and by the express terms of the pretrial order in this  
14 case. Those evidentiary issues are issues that the  
15 government's been deprived of for two weeks roughly that  
16 I intended the government would have to respond.

17 As I noted in the January 31, 2012 order, I've  
18 encountered similar problems with Mr. McGinty before.  
19 As I recall, I expressly warned Mr. McGinty that future  
20 problems of this sort could result in sanctions,  
21 including contempt. I also had Ms. Conrad into court to  
22 express concerns about, I believe, Mr. McGinty and also  
23 other assistant federal public defenders failing to meet  
24 deadlines, which I don't interpret generally or in this  
25 case as any expression of disrespect to the Court

1 personally, but is something that is deeply injurious to  
2 the Court's ability to properly control its calendar and  
3 prepare to decide an important matter. And Mr. McGinty  
4 and Ms. Conrad should feel encouraged to confirm whether  
5 my memory of our prior colloquies is correct. But in  
6 this particular case, the failure to make timely and  
7 complete filings is threatening, if not injuring, my  
8 ability to make properly-informed judgments on  
9 challenging issues in an usual case.

10 I have not instituted civil or criminal contempt  
11 proceedings, but if there are going to be criminal  
12 contempt proceedings or civil contempt proceedings,  
13 they'll be pursuant to formal notice and an opportunity  
14 to be heard. If there are criminal contempt  
15 proceedings, it's a criminal case and based on what I  
16 know, I don't imagine the sanction will be more than 6  
17 months in prison or jail or custody, so it would be a  
18 bench trial, and Mr. McGinty would have all of the  
19 rights of any criminal defendant.

20 I ordered Ms. Conrad to be here because it's the  
21 Federal Public Defender's Office appointed to represent  
22 Mr. Harris in this case and it's Federal Public  
23 Defender's responsibility to assure that Court orders  
24 are obeyed.

25 I state what I hope will be obvious, but it might

1 not be clear to Mr. Harris, that he's not going to be  
2 punished in any way because of his counsel's failure to  
3 obey orders. What I'm actually concerned about is the  
4 fact that I haven't, in a timely way, been given by the  
5 defendant any of the information that is required to be  
6 submitted by January 13 and I still haven't got all of  
7 it. And my goal, in part, is to make sure that  
8 Mr. Harris is very effectively represented and he's not  
9 going to be prejudiced by me or anybody else because  
10 I've unfortunately had to deal with this issue  
11 concerning his counsel.

12 So I'd like to give Mr. McGinty and Ms. Conrad an  
13 opportunity to address this as I decide the immediate  
14 issues of whether to institute civil and/or criminal  
15 contempt proceedings.

16 MR. MCGINTY: Your Honor, um, this Court  
17 entered an order, the order was quite clear, I failed to  
18 meet the requirements of the order. I did not do it  
19 deliberately. Nonetheless, um, I have responsibilities  
20 to meet and I didn't meet them.

21 THE COURT: Well, what do you mean you didn't  
22 do it deliberately?

23 MR. MCGINTY: Pardon?

24 THE COURT: I'm not sure what you mean when  
25 you say you didn't do it --

1 MR. MCGINTY: I intended no affront to the  
2 Court and I certainly understood the gravity of the  
3 issues here and did not intend to do anything which  
4 would diminish the opportunity to address these issues  
5 and address them appropriately.

6 I have been preparing a second case which took me  
7 out of the United States between January 4th and January  
8 20th. I failed in my calendaring of the  
9 responsibilities in this case. I spoke to Mr. Harris  
10 last night and I told him that the Court had entered an  
11 order which reflected on both my diligence and my  
12 commitment to the case, that order is a significant  
13 judgment on the quality of work that I've done, and  
14 Mr. Harris ought to be mindful of that in listening to  
15 what transpires at this hearing and making a judgment  
16 about whether I serve his interests properly. I do not  
17 recall --

18 THE COURT: Well -- I'm sorry.

19 MR. MCGINTY: I do not recall, and I say this  
20 having searched my memory, I do not recall an instance  
21 where the Court addressed me on the subject of contempt  
22 or my failure to file or my failure to address an issue  
23 properly. I say that having searched my memory. I  
24 have, um, attempted in this court, perhaps more than in  
25 some other courts, but I have attempted in this court to

1 attend to responsibilities that have been assigned to me  
2 and do it in proper fashion.

3 THE COURT: And just to be careful. This is  
4 why I invited you to either confirm or correct my  
5 memory. It's conceivable that I've confused something  
6 that we've had -- that I had with one of your colleagues  
7 with you. I think -- and I must say that I've been  
8 doing many other things today, too, and I put that order  
9 out very quickly yesterday. I had to because we have  
10 hearings next week and my schedule is very busy. We're  
11 going to use all the time I've set aside for the  
12 hearings and for the trial.

13 If I made a mistake about our prior history  
14 together, and I may have, um, I'm sorry I did that and  
15 maybe Ms. Conrad will be able to clarify who she and I  
16 were speaking about. I assume she remembers our  
17 colloquies.

18 But go ahead.

19 MR. MCGINTY: I will say I have searched my  
20 memory and I have tried to -- I'd even looked through  
21 chronology of cases, trying to unearth the instance  
22 where I fell short, um, of an obligation in a case where  
23 the Court brought it to my attention and where the issue  
24 of contempt or the consequences or a penalty or a  
25 discipline or anything of that sort was ever raised with

1 me and frankly I --

2 THE COURT: And for present purposes, I'm  
3 going to accept that.

4 MR. MCGINTY: Now, um, I have --

5 THE COURT: Subject to learning something  
6 else.

7 MR. MCGINTY: I have tried in this case to  
8 raise the issues which I thought were fairly raised by  
9 the indictment. I raised those understanding and  
10 appreciating that this court takes those issues  
11 seriously. So in each briefing I've done, I've tried to  
12 address cases both favorable and unfavorable. I've  
13 tried to place it in a light that expresses as best I  
14 can what I think are the novel issues that are, um --  
15 are raised in this case and the novel issues which I  
16 think sort of push the law beyond what any known cases  
17 have permitted. I've done that as carefully as I've  
18 could. I've tried to raise every issue I could possibly  
19 raise.

20 THE COURT: But you raised nothing, you  
21 addressed nothing on January 13th. You filed nothing.

22 MR. MCGINTY: And I have no excuse for that.  
23 I have none. You know, a failure -- and I told this to  
24 my client. I have -- you know, where there's an  
25 obligation to file papers, I have the obligation to meet

1       that date. I didn't do that here.

2               THE COURT: And you or somebody must have been  
3       doing some work on this because what you filed last  
4       night, um, didn't look like you had written it in just a  
5       couple of hours.

6               MR. MCGINTY: No, I've been working on this  
7       case. I was in Judge Saylor's session just last week  
8       trying to get access to some impeachment material that I  
9       might use in connection with one of the government's  
10      witnesses. The government was there as well. There has  
11      been -- I have tried to parse in this case, as best I  
12      can, what I think are a series of issues, sorting them  
13      and identifying how they interrelate with one another,  
14      and this has posed some difficulty. I have tried as  
15      best I can to sort those. I had drafted papers to do  
16      that.

17              So yesterday, no, I didn't, last night, try to,  
18      um, write -- without having outlined, without having  
19      tried to thought through or think through what exactly  
20      would be the issues that would have to be addressed in  
21      the papers.

22              I am dismayed by my failure, um, and I tried to  
23      make that plain to Mr. Harris, because apart from  
24      apologizing to the Court, he has little way of assessing  
25      whether a lawyer is acting appropriately, diligently,

1 carefully, and responsibly, and his few ways of doing  
2 that depend upon judgments that are relatively  
3 underinformed. So he has to rely on me and failing to  
4 do something in time to raise issues before the Court is  
5 a significant dereliction, and I told him that, and I  
6 told him that he has to make a judgment about whether  
7 this reflects on my larger commitment to the case and my  
8 larger preparation to the case, because I think it does.

9 So I am dismayed in my failure to meet the Court's  
10 order. I am dismayed at the failure to raise issues  
11 which I think are consequential in how this court frames  
12 instructions to the jury on how the Court identifies  
13 what issues the jury is going to address and how that's  
14 going to be framed for them. There are numerous novel  
15 issues here and it aids the Court not a bit to have  
16 those presentations made untimely.

17 I would say with respect to the motions in limine,  
18 um, the difficulty that I had in framing this is in  
19 trying, um, to try to find an order and coherence to the  
20 contest to the way the government is presenting the case  
21 and -- so that certain of the issues that are in the  
22 memorandum are addressed in one frame, um -- so, for  
23 example, the issue of the rim on the conspiracy, um,  
24 depends upon issues that relate to a web forum and how  
25 that web forum -- whether the content of the web forum

1 is admissible and under what circumstances.

2 So in the papers I'm addressing multiply the issue  
3 of the admissibility and the consequence of the  
4 admission of those things because they interrelate to a  
5 number of issues that sort of weave through the  
6 presentation.

7 THE COURT: Well, the -- I've read, but not  
8 studied your submission and the government's trial  
9 brief, and some of these issues are issues that I either  
10 identified or amplified when you were here on December  
11 13th. They're serious issues. I pointed you and --  
12 it's in my written order, to my **Pappathanase** decision,  
13 the only time in almost 27 years I've granted a Rule 29  
14 on a whole case, that a particular conspiracy charge was  
15 not a conspiracy that could have been proven on the  
16 evidence. And these are challenging issues. And I can  
17 see you're doing some work on them.

18 MR. MCGINTY: And I tried to address  
19 **Pappathanase** several times in my brief to sort of  
20 develop the issue.

21 THE COURT: I know. I know. And -- well, let  
22 me see what Ms. Conrad has to say about all of this.

23 MS. CONRAD: Thank you, your Honor.

24 Your Honor, first of all, with respect to the  
25 question about prior interactions about these types of

1 issues, I recall one occasion probably about five years  
2 ago, if memory serves, I think the issue was the late  
3 filing of a sentencing memorandum by another assistant  
4 public offender, um, not --

5 THE COURT: Who is that?

6 MS. CONRAD: Oscar Cruz.

7 THE COURT: Yeah, it occurred to me today that  
8 I may have confused Mr. McGinty with Mr. Cruz.

9 MS. CONRAD: I am aware of one other instance  
10 in which the Court had expressed its displeasure about a  
11 missed deadline. I don't remember the details. I do  
12 not recall that I appeared in court on that matter. I  
13 believe the instance with Mr. Cruz was the only  
14 instance. I, at that time informed the staff or  
15 reminded the staff of the importance of meeting  
16 deadlines, the importance of not simply presuming that a  
17 motion for leave -- a motion for leave to file late  
18 would be allowed and simply letting the deadline blow  
19 past. And in particular I discussed and have discussed  
20 those issues with Mr. McGinty on many occasions, not  
21 because of any concern I had about his ability to meet  
22 those, but because he's the First Assistant Federal  
23 Public Defender and in that capacity we discuss  
24 administrative and supervisory issues on a regular  
25 basis, and I know he's well aware and has joined me in

1 reminding the staff of the importance of these things.

2 I am ultimately convinced that Mr. McGinty simply  
3 failed to report the deadlines in a place where he would  
4 be reminded of it and I think that was compounded by the  
5 fact that he was out of the country in a different time  
6 zone from January 4th through January 20th working on a  
7 case where largely he was in Rwanda with limited ability  
8 to communicate with the office. So I think that there  
9 is -- this was absolutely an instance of, at most,  
10 negligence.

11 However, I also want to emphasize that with  
12 respect to the entirety of this case, it is not a  
13 reflection of neglect of this case. Mr. McGinty has  
14 been working very hard on this case for quite some  
15 time. Um, I pass his office on the way in in the  
16 morning. I pass his office on the way out in the  
17 evening. He is in early, he's been meeting with  
18 others. He's been working on the case, researching the  
19 case and preparing for trial. And I know that he has  
20 devoted and dedicated himself to this case as he does  
21 with all of his cases. And I don't think there's any  
22 question that, um, this was an instance in which he  
23 simply put the case on the back burner and neglected to  
24 attend to it.

25 THE COURT: Well, when I saw Mr. McGinty in

1 December, he told me he had another major case, um,  
2 beginning I think in April, um, maybe even earlier, and  
3 he actually was asking for the February 6th trial date  
4 because he wanted to interview witnesses after that.  
5 And he has, up to this point, you know, paid serious  
6 attention to the case and he's certainly capable of  
7 doing it, but in my view you share substantial  
8 responsibility for this. The case is assigned to you,  
9 the Federal Public Defender, you decide how to staff  
10 it.

11 Mr. McGinty keeps telling me, and I don't think  
12 he's exaggerating, that this case is unprecedented or  
13 particularly presents novel challenging issues. You  
14 know, in many -- you know, if he's got that other major  
15 matter and he's got this case and he can't do both of  
16 them in a timely way, um, you've got other people in  
17 your office. And, in fact, typically, I believe, these  
18 days two assistant federal defenders as well as two  
19 prosecutors show up in every case, including felon in  
20 possession cases. As I recall when you were before me  
21 in **Andrews** recently, you had somebody sitting next to  
22 you, but I don't know what she did.

23 MS. CONRAD: She's not an assistant federal  
24 public defender.

25 THE COURT: The point is, um, it strikes me

1     that this is an institutional failure as well as an  
2     individual failure. I've actually had some discussion  
3     since yesterday with about five of my colleagues who --  
4     well, they haven't had this problem, they've had others  
5     with Mr. McGinty's colleagues and outside the context of  
6     this case I expect you'll be informed of those and  
7     they'll be addressed.

8             MS. CONRAD: Well, I certainly welcome their  
9     feedback, your Honor. I try to monitor things as best I  
10    can. The only reason I point out the issue as far as an  
11    assistant public defender as well as another type of  
12    lawyer is that we do have in our office a research and  
13    writing specialist who provides substantial assistance  
14    on the cases. But we also are attempting to staff our  
15    cases in a way where we can maximize the percentage of  
16    indigent cases that we can take and that does not  
17    necessarily entail having double staffing trials,  
18    unlike, I'd say, most of the U.S. Attorneys do. We have  
19    done that, in the past, for training purposes, but it is  
20    not the rule of thumb.

21            THE COURT: Well, we're not at trial and this  
22    was in part a failure with regard to research and  
23    writing.

24            MS. CONRAD: Right.

25            THE COURT: There are novel issues. I -- that

1       were identified by the parties. There were issues  
2       identified by me. Did you read my December 14th order?

3               MS. CONRAD: I did.

4               THE COURT: I thought you would. You know,  
5       I'm pointing out cases, I'm sculpting questions that are  
6       not ordinarily done. And aren't those the type of  
7       matters that your research and writing specialist  
8       assists on?

9               MS. CONRAD: Yes, and I believe that  
10       Mr. McGinty has had the assistance of a research and  
11       writing specialist in this case, which is probably one  
12       of the reasons why he was able to file a thorough memo  
13       last night. It was simply a failure to, um,  
14       internalize, if you will, what the deadline was. It was  
15       not a failure to do the underlying work.

16              THE COURT: Well --

17              MS. CONRAD: I know that Mr. McGinty was  
18       appalled when he realized that he had missed this  
19       deadline. I was present when the order -- he called me  
20       immediately when he received the order. I was already  
21       aware of the order. And, um, he was quite abashed and  
22       flummoxed by the fact that he had done this. But --

23              THE COURT: And this was -- I confidently  
24       assumed yesterday that this wasn't intended to be  
25       disrespectful of the court and I'm confirmed in that

1 assumption. My concern is for my ability to manage a  
2 very busy calendar and to decide challenging issues on  
3 an informed basis, which requires that they be briefed  
4 well, sufficiently far in advance, so the parties have a  
5 chance to address each other's arguments and so I can  
6 study them and make informed decisions. I've carved out  
7 at least two mornings next week to do that. And my  
8 focus -- our focus is now going to be on what remains to  
9 be done, um, so I can try to accomplish what I intended  
10 to accomplish next week and so anything further that  
11 needs to be done before February 21, um, when we start  
12 trial, will be done and so the trial can proceed as  
13 efficiently as possible, because it is going to proceed  
14 on that date.

15 When I have everything that I previously ordered  
16 -- and the government's got more work to do, too, um,  
17 there will be no more issue of civil contempt. Civil  
18 contempt is intended to compel compliance with orders.  
19 Potentially there's the issue of criminal contempt, but,  
20 um, at the moment I'm not inclined to go in that  
21 direction either, but I haven't -- it's not what I  
22 intend to focus on right now.

23 I don't have any actual motions in limine, I don't  
24 have any memos in support of them, and I don't have it  
25 from the government either. And I think the

1 government's treatment of a number of these evidentiary  
2 issues have been far too casual. I think I said this in  
3 December, but -- I know I can conditionally admit  
4 co-conspirator hearsay. I also have the authority to  
5 require that all of the evidence that you're going to  
6 use be presented first. In most cases I wouldn't do  
7 that. But it's not clear to me, from reading the  
8 government's trial brief, who the alleged  
9 co-conspirators are as to whom I'm making **Petrozziello**  
10 rulings and it's not even clear to me that the  
11 government's identified the people who made the  
12 statements or want submitted under Rule 801(d)(2)(E).  
13 And if you've got cases -- and maybe you mentioned it,  
14 but if you've got cases that say something can come in  
15 under Rule 801(d)(2)(E) without identifying a declarant,  
16 um, that's not a common issue. And that's by way of  
17 example, because I haven't studied it.

18 Of course I'm offended that it was at about 8:00  
19 last night you raised some issues that seem to be --  
20 well, they're at least new to me. I don't know to what  
21 extent they're new to the government regarding  
22 admissibility. Are they new, some of them?

23 MR. BOOKBINDER: Some are, your Honor. I  
24 think that's fair to say.

25 THE COURT: You're supposed to have two weeks

1 -- not two weeks, but 12 days to address them. And I  
2 was supposed to have them the 25th to the 7th to work on  
3 them.

4 I don't issue orders that I don't intend to  
5 enforce and I don't issue orders that I feel are  
6 impossible to obey, but my inclination is to order the  
7 defendant and the government to convert their  
8 submissions regarding the evidentiary issues into  
9 motions in limine, discrete documents, each with a  
10 supporting memo, just as stated in the pretrial order  
11 and just as stated in Rule 7.1, and to have them filed  
12 by 9:00 on Friday morning -- unless you persuasively  
13 tell me that's not feasible, and if it's not, tell me.

14 MR. BOOKBINDER: Your Honor, from the  
15 government's perspective, could I have a moment to  
16 consult?

17 THE COURT: Yes.

18 MR. BOOKBINDER: Thank you.

19 (Pause.)

20 MR. BOOKBINDER: Your Honor, from the  
21 government's perspective, if you're talking about us  
22 filing motions in limine to admit essentially the  
23 co-conspirator statements, um, and I think we've now --  
24 we're now in a position where we've narrowed and focused  
25 more on those statements than we had when we filed the

1 trial brief. So we ought to be able to file something  
2 about that by Friday morning. I think if what the  
3 Court's looking for is for us to respond to the issues  
4 Mr. McGinty raised, that may be difficult.

5 THE COURT: Yeah, I'm just -- maybe I'm -- but  
6 you raised a couple of issues -- evidentiary issues.  
7 It's Page 26, regarding the post -- you cite some cases  
8 there. You've come closer to what I had in mind.

9 On this issue of co-conspirator statements, I just  
10 told you what I thought, but, you know, it's true as far  
11 as it goes on Page 29 that, under **Petrozziello** I can  
12 conditionally admit -- I think I said this in December,  
13 but maybe I didn't. I also have, as I said, the  
14 discretion to require that you make a substantial  
15 showing either before trial or with your first  
16 witnesses. I don't want to try this case for three  
17 weeks and then tell the jury, um, they have to disregard  
18 a substantial amount of evidence. That's going to  
19 invite a mistrial and maybe precipitate it.

20 MR. BOOKBINDER: Your Honor, it may be helpful  
21 to -- we've got some clarification on what our witness  
22 order is going to be and when things will come in and  
23 the posts --

24 THE COURT: I don't want to hear about this  
25 now.

1 MR. BOOKBINDER: Okay, but we may get --

2 THE COURT: But here's the issue. You know, I  
3 didn't see in your submission who you want me to make  
4 **Petrozziello** rulings on. What you should give me is the  
5 names of all those people and what the evidence is going  
6 to be that they made the statements in furtherance of  
7 some conspiracy, not necessarily a conspiracy in this  
8 case -- and there are First Circuit cases that you could  
9 cite for that proposition, um, and then, you know, we're  
10 scheduled to start on Tuesday morning with these issues,  
11 on Tuesday morning, on Wednesday morning, and then I  
12 thought I wasn't going to see you again until we started  
13 trial.

14 Mr. McGinty, you know, starting on Page 19 of your  
15 memorandum you filed last night, there's a whole series  
16 of statements with the citation of virtually no cases,  
17 um, that various forms of proposed evidence are  
18 inadmissible. Each of those is, in fact, a motion in  
19 limine.

20 Is your office able to supplement this by Friday  
21 morning?

22 MR. MCGINTY: Yes.

23 THE COURT: And I think these are -- because  
24 of the novelty of the case, you know, I think these are  
25 serious issues. And the reason I directed you -- I also

1 don't have -- the trial memo makes some mention of jury  
2 instruction issues, again, without much authority on  
3 them. The government's proposed jury instructions,  
4 which I've only glanced at, seem to me to be too generic  
5 for this case and this is why I asked you to confer to  
6 try to identify the issues. But I don't have any  
7 proposed jury instruction from the defendant, including  
8 the trial brief. I mean, there's some mention  
9 particularly of --

10 MR. MCGINTY: I differ -- I differ. There's a  
11 list of instructions with footnotes in support of them,  
12 instructions that create the balance --

13 THE COURT: I want a complete set of  
14 substantive instructions as I typically, um, would get  
15 so I can read one and read the other. I mean, this is  
16 helpful. This is a beginning.

17 MR. MCGINTY: Your Honor, the difficulty is  
18 that I can't -- I can't foresee the government's case  
19 surviving Rule 29. I can't. So my difficult in framing  
20 --

21 THE COURT: But this is exactly why -- what  
22 I'm ordering you to do, what I previously ordered you to  
23 do is so important. Because I can't make informed  
24 evidentiary rulings unless I have a good sense of what  
25 I'm going to instruct at the end of the case. And it

1 evolves. It evolves. That's one. And, two, um, you  
2 need that for a Rule 29. I don't need proposed  
3 instructions on reasonable doubt.

4 But I essentially am looking to -- what I was --  
5 if you had all done what I directed you -- ordered you  
6 to do on December 13th and 14th, these issues would now  
7 be in much sharper focus. I would have a better idea of  
8 what the government is going to need to prove to survive  
9 a Rule 29 motion. And now I'll look the this. It's  
10 helpful. But it doesn't strike me as complete.

11 MR. MCGINTY: If I could just frame my  
12 difficulty.

13 The government's view, and they express it in one  
14 of their instructions, is that the inherent  
15 susceptibility of a sole object to be misused is -- can  
16 support a finding of a conspiracy with this, between the  
17 seller and the purchaser, and aiding and abetting of the  
18 seller, um, of the conduct of the purchaser. Now, I  
19 can't find any cases that support that. And I would  
20 submit that **Direct Sales** says quite the opposite.

21 So in terms of my framing an instruction that  
22 guides the jury to understand a proposition which I  
23 don't think is supported in the law, I can't do it.

24 THE COURT: I think we had some of this  
25 discussion in December. You talked about the hammer --

1 or was that another case?

2 MR. MCGINTY: But I think that --

3 THE COURT: You know, if you sell somebody a  
4 hammer, it's not intrinsically illegal, but if somebody  
5 -- I think I said this in December. If somebody says to  
6 you, you know, at Home Depot, "Sell me a hammer. I want  
7 to go home and bash my wife's skull and kill her and  
8 collect the insurance," and the guy says, "I'm happy to  
9 sell you a hammer for that purpose and, you know, you're  
10 not just going to pay me for the hammer, you're going to  
11 pay me another 1,000 bucks." The hammer's an overt act.

12 MR. MCGINTY: That conspiracy involves a  
13 person being drawn into the specific conduct. That's  
14 the -- precisely the problem here is that that's not the  
15 case. And what I tried to do in the motion to dismiss  
16 is to say that the government's summary of what their  
17 evidence is going to be is that three of the four  
18 purchases, purchased without conversation, without  
19 communication, without expression of what they were  
20 going to do, with no information between conveyed  
21 between buyer and purchaser. So under those  
22 circumstances, for me to frame an instruction that gives  
23 the jury to understand what the boundaries are of the  
24 law that helps them distill that, I can't do it because  
25 the answer is that's not a proposition supported by the

1 law. **Direct Sales.**

2 THE COURT: So you would just write out what  
3 you would like me to say to the jury.

4 MR. MCGINTY: And that's exactly what I did.  
5 So turn to Page 3, 4, 5, 6 and 7.

6 THE COURT: Okay. So where do you define here  
7 the elements of wire fraud?

8 MR. MCGINTY: I did not put the elements down  
9 there and I apologize for that.

10 But in terms of the boundaries particular to this  
11 case and in terms of what the propositions are that's  
12 going to guide the jury's evaluation of the facts, I  
13 can't give structure to a theory that I don't think is  
14 supported in the law. I don't know how to do that.

15 THE COURT: You don't have to give me their  
16 theory, I want you to give me -- I've ordered you. I'm  
17 ordering you again, to give me -- you know what proposed  
18 jury instructions look like. Your office files them in  
19 almost every case. But the generic pattern instructions  
20 require considerable tailoring and I gave you elaborate  
21 conspiracy instructions.

22 There's no proposed instruction here that I recall  
23 seeing, for example, about venue. This is a case that  
24 involves the jury being required to find something that  
25 I can't ever remember having instructed on. Doesn't the

1 government have to prove venue? That was part of your  
2 motion to dismiss.

3 MR. MCGINTY: I remember it quite well and  
4 I --

5 THE COURT: I want a set of documents that I  
6 can use to fashion jury instructions. When I have the  
7 jury instructions from the two sides, it will bring into  
8 sharper focus for me what I have to resolve and give me  
9 a framework that I expect will evolve, as I continue to  
10 work on it, to decide the foreseeable Rule 20 -- to  
11 decide the evidentiary issues. In other words, it's not  
12 that evidence of a hammer is inadmissible, but it's not  
13 alone enough, it's not intrinsically unlawful to buy a  
14 hammer. Um, it will assist me in making evidentiary  
15 rulings. It will give me a framework -- certainly your  
16 view of the framework as to how I would decide a Rule 29  
17 motion.

18 And I think -- and I'll study this far more, but I  
19 think there are -- based on what I've been told, there  
20 are substantial questions about whether the conspiracy  
21 charged can be proven.

22 In fact, where is Mr. Hanshaw now?

23 MR. BOOKBINDER: Mr. Hanshaw, your Honor, is  
24 now in custody. We had a final revocation hearing last  
25 week. That's what Mr. McGinty had hinted at as well.

1 His release has been revoked. He is in custody for the  
2 next four months. So he will be a witness.

3 THE COURT: Okay. Here, I want those jury  
4 instructions in their familiar form. Even your  
5 positions on them might evolve.

6 But can that be done by Friday, too?

7 MR. MCGINTY: Well, I can't -- I will try to  
8 do that by Friday by 5:00 p.m.

9 Um, your Honor, I don't mean to belabor this  
10 point, but I read the government's instruction on when  
11 it is a seller of an object can be complicit in a  
12 conspiracy. It creates no cognizable standard that a  
13 jury could use in evaluating what passes for sufficiency  
14 to prove that.

15 In asking me to provide a responsive instruction  
16 to give life to a theory of culpability which I don't  
17 think is supported by law, I literally don't know how to  
18 do that.

19 Now, I can give the Court -- I can go through the  
20 instructions that the Court used in *DiMasi* and propose  
21 those to the Court, the omission is going to be that I  
22 can't furnish the theory that they have to give life to  
23 to explain how it is that a seller becomes responsible  
24 for consequential conduct of third parties. I mean,  
25 what is the knowledge component? What has to be

1     communicated? Do there have to be multiple sales? What  
2     are the predicates a jury evaluates to make complicity  
3     someone, who by operation of law, is not complicit  
4     without that added ingredient.

5             Now, if the example's going to be if someone's  
6     sold a knife and is told, "I'm going to take this and  
7     kill my wife tonight with this knife," I can write that  
8     instruction. That if the person identifies with  
9     precision the culpable conduct, that -- that -- I can  
10    write that. That's not --

11            THE COURT: Well, you write what you think  
12    needs to be proven and cite the authority and some of  
13    it, I'm sure, or maybe all of it's in your footnotes. I  
14    want to know what you think I should tell the jury. And  
15    then the government will know, we'll see the  
16    differences, and I'll be able to focus on it.

17            I'll give you until 4:00 on Friday to do that by.  
18    And then we'll start, as scheduled, on Tuesday morning.  
19    I have until 1:00. We'll continue on Wednesday morning,  
20    I expect. We'll get as far as we can get. That's all  
21    we'll do next week. And we'll see what remains to be  
22    done before trial.

23            The government needs to -- let me ask you this.  
24    The defendant needs to respond to the government's  
25    motion in limine, motions in limine, and the government

1 needs to respond to the defendant's. How about Monday  
2 morning? Which means you need to finish all this --  
3 except for perhaps Ms. Sedky, before 6:00 on Sunday  
4 night when the Patriots play in the Superbowl.

5 MS. SEDKY: I will not be watching, your  
6 Honor.

7 THE COURT: That's what I meant.

8 MS. SEDKY: I will be happily working on the  
9 briefing.

10 MR. BOOKBINDER: Um, your Honor, yes, we'll  
11 file our responses by Monday morning. If I could just  
12 clarify --

13 THE COURT: I'm going to say by 9:30 on Monday  
14 morning. You're both going to finish your motions in  
15 limine, submit them on Friday. Did I give you a time?  
16 What did I say, 9:00? You can make that --

17 Is that what I said?

18 (Pause.)

19 THE COURT: Well, go to 10:00. All right?  
20 And we'll give you a written order on this, too.

21 MR. BOOKBINDER: Your Honor, I just want to  
22 clarify and make sure I understand, because we don't  
23 want to -- we want to provide what will to be helpful to  
24 the Court. I think there were -- the issue that, um,  
25 the Court would like us to address in our motions is

1 about the co-conspirator statements that we mention in  
2 the trial brief, um, who the speakers are, um, and why.  
3 What the evidence is that the -- that we will be  
4 presenting that these people are co-conspirators. Is  
5 that correct?

6 THE COURT: Just a second.

7 (Pause.)

8 THE COURT: Starting on page -- on Page 28 are  
9 the issues about the co-conspirator hearsay. You can  
10 tell the defendant and me now.

11 Is the government going to be trying to get  
12 admitted as co-conspirator hearsay statements by  
13 unidentified individuals?

14 MR. BOOKBINDER: Your Honor, if I could have  
15 one second.

16 THE COURT: Yes.

17 (Pause.)

18 MR. BOOKBINDER: Your Honor, the reason we  
19 hesitate in answering are there are two sets of what  
20 would qualify as co-conspirator statements. There are  
21 the posts, and the posts are discussed on Page 28, and  
22 there are also -- and starting on Page 26, I guess. And  
23 then there are also a set of what are chats, which are  
24 conversations between Mr. Harris and a specific  
25 individual. On four of the posts, um, we know who those

1 people are. They use, you know, nicknames to post --  
2 what we have, um, the records would show what people  
3 bought and what are their names. So in those cases  
4 they're not unidentified. We do know who they are.

5 But for the chats, there are conversations between  
6 Mr. Harris and, um, some of them are between people who  
7 are going to be witnesses in the case, so there's  
8 obviously a question about who they are, and they're  
9 between people who are going to be co-conspirators,  
10 Mr. Phillips, Mr. Hanshaw. There are also chats with  
11 other people who are not witnesses and who we only know  
12 by nicknames. In those cases, um, I believe that our  
13 position is -- and we'll crystallize this for the Court,  
14 is that we are not seeking to introduce for their truth  
15 statements made by these other people who we don't know  
16 who they are. Any statements of theirs would come in,  
17 if at all, to show context for what Mr. Harris says or  
18 to show their effect on him. So we would not be seeking  
19 to introduce those as co-conspirator statements and I  
20 think that's the distinction that we're going to make.

21 THE COURT: I want you to identify at least a  
22 sample of each of those, so it's not an abstract concept  
23 for me, and you've cited some cases for these  
24 propositions, but, you know, what propositions are you  
25 relying on? How -- you know, "These statements like the

1 following are not being entered for their truth" --  
2 although -- well, I need the statement. If some  
3 unidentified person says, "Your product is great. It  
4 permits me to steal Internet service. I'm saving a  
5 fortune and ripping off Comcast, which I hate," I don't  
6 know whether you regard that as being for the truth or  
7 not.

8 MR. BOOKBINDER: That's a good question.

9 THE COURT: Well, there's a good argument it's  
10 for the truth and I think it's probably for the truth  
11 because if you -- it seems to me that if you have to --  
12 you know, you've undertaken to say -- to prove -- to say  
13 you recognize you should prove, you're required to prove  
14 that Mr. Harris knew that the product would be used by  
15 particular people to get something of value without  
16 paying from the internet service providers.

17 MR. BOOKBINDER: Your Honor, we will flesh it  
18 out in what we file and we will attach at least samples  
19 of all of the --

20 THE COURT: All right.

21 MR. BOOKBINDER: Your Honor, you also -- you  
22 know, you refer to the jury instructions and the fact  
23 that --

24 THE COURT: I'll have to look at them more  
25 closely.

1 MR. BOOKBINDER: That you thought they may be  
2 too generic.

3 THE COURT: I'll look at them. I haven't  
4 studied them.

5 MR. BOOKBINDER: So we won't plan to deal with  
6 that until Friday.

7 THE COURT: I'll take a look at them. See in  
8 view of what Mr. McGinty filed, whether you think they  
9 require some refinement. This is already injuring our  
10 ability to work the way I intend to work. But, you  
11 know, we're starting a trial in three weeks, and I'll  
12 say the following.

13 Mr. Harris, are you still there?

14 THE DEFENDANT: Yes, I am.

15 THE COURT: Um, in Mr. McGinty you have a very  
16 experienced, intelligent, and energetic lawyer. No  
17 lawyer has just one case and he made a disturbing  
18 mistake in this case, up till now, in the last month.  
19 Having said that, he knows your case. I expect that he  
20 and Ms. Conrad are going to make sure that not only he,  
21 but whoever else is necessary, um, will work on  
22 representing you. A person with court-appointed counsel  
23 does not have a right to whoever he wants to represent  
24 him, there has to be a good reason to replace counsel,  
25 and particularly as trial approaches.

1           So you can talk to Mr. McGinty about whatever you  
2           want to talk to him about. If any motions are filed,  
3           I'll deal with them. But nobody should fail to obey any  
4           of my orders because he or she thinks that this case is  
5           not going to proceed on the schedule that I've  
6           established.

7           And, Ms. Conrad, the order I'm going to issue,  
8           probably tomorrow, is going to direct you to discharge  
9           what is your responsibility anyway, to make sure that  
10          all orders in this case are obeyed. It's your office  
11          that's appointed. And while I certainly don't expect  
12          there's going to be any repetition of this problem in  
13          this case, if there is, the order's directed to you as  
14          well as Mr. McGinty and anybody who may appear with  
15          him.

16          It's very unfortunate that any of us have had to  
17          spend time on this, but, as I've said, we've got three  
18          weeks until trial. We'll do what's necessary to start  
19          that trial and I trust to finish it on schedule and I  
20          think it raises a lot of interesting issues, many of  
21          them identified by Mr. McGinty.

22          Is there anything further for today?

23                 MS. CONRAD: Not from me, your Honor.

24                 MR. BOOKBINDER: Not from the government, your  
25          Honor.

1 THE COURT: All right. The Court is in  
2 recess.

3 (Ends, 5:00 p.m.)  
4

5 C E R T I F I C A T E  
6

7 I, RICHARD H. ROMANOW, OFFICIAL COURT REPORTER, do  
8 hereby certify that the forgoing transcript of the  
9 record is a true and accurate transcription of my  
10 stenographic notes, before Chief Judge Mark L. Wolf, on  
11 Tuesday, February 1, 2012, to the best of my skill and  
12 ability.  
13  
14

15 /s/ Richard H. Romanow 11-06-12

16 \_\_\_\_\_  
RICHARD H. ROMANOW Date  
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